Petition

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81-863

No.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

J. R. SIMPLOT COMPANY,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION,
U. S. DEPARTMENT OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES T. HUNGELMANN
Assistant General
Counsel
J. R. Simplot
Company
P. O. Box 27
Boise, Idaho 83707
(208) 336-2110

Attorney for
Petitioner

QUESTION PRESENTED:

Should a Writ of Certiorari issue to the Court of Appeals for its refusal to invalidate an OSHA warrant authorizing a wall-to-wall inspection of a worksite consisting of two facilities, a potato processing plant and a feedlot, where probable cause for the inspection was based solely upon an employee complaint alleging violations only in the feedlot?

J. R. Simplot Company is the parent corporation with no subsidiaries other than wholly owned and with the following affiliates: Carnation Foods Company, Ltd., Topsoil Schoenewe, Inc., and Carduff Farmserve, Ltd.

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JURISDICTIONAL GROUNDS

Petitioner seeks to have reviewed the decision of the Ninth Circuit court of Appeals, Case Nos. 79-4750 and 79-7596 decided April 3, 1981, appearing as J. R. Simplot Company v. Occupational Safety and Health Administration, U. S. Department of Labor, 640 F.2d 1134 (1981).

A timely filed Peition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied by order dated June 22, 1981.

The United States Supreme Court's jurisdiction to review by Writ of Certiorari the decision of the Ninth Circuit Court of Appeals below is provided by 28 U.S.C. Section 2101(c).

STATUTORY PROVISIONS

Section 8(a), Occupational Safety and Health Act of 1970, 29 U.S.C. Section 657(a):

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Section 8(f)(1), Occupational Safety and Health Act of 1970, 29 U.S.C. Section 657(f)(1):

Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he

shall make a special inspection in accordance with the provisions of this section to determine if such violation or danager exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

STATEMENT OF THE CASE

On May 17, 1978, the Secretary of Labor received a telephone call from an employee of J. R. Simplot Company (Simplot) alleging the existence of two safety hazards at Simplot's feedlot near Caldwell, Idaho. The feedlot is located directly across the highway from a potato-processing plant which is also owned by Simplot. The Secretary's compliance officer attempted to inspect the Simplot workplace in response to the employee complaint, but was advised that his admittance to the feedlot would be denied and that a search warrant would be required before an inspection would be permitted.

Four months later the Secretary applied for and obtained an administrative inspection warrant from the U. S. District Court for the District of Idaho. Attached to the application were a copy of the employee complaint and an affidavit of the OSHA compliance officer who had attempted to make the earlier inspection. The affidavit made reference to the employee complaint and the subsequent inspection which was attempted to be made "pursuant to

Section 8(f)(1) of the Act", recited Simplot's refusal to allow OSHA's entry without a warrant, and then concluded as follows:

> From my reviewing of previous inspection files, I believe that the nature of the business conducted by the J. R. Simplot Company, consists of mining, growing, raising, processing and distributing of agricultural products such as potatoes, grain, cattle, and fertilizers of which phosphate materials are imported from Brandon, Canada, thus subjecting the firm to the inspection of worksite provisions of the Act.

The employee complaint listed the specific violations at the feedlot. In particular, it narrowly described the worksite location of the alleged violations as the "Grain mill and fuel service truck", the kind of business as "Feedlot-Grain mill", located at "Feedlot No. 3, Highway 19 about 2 Mi, West of Caldwell."

The warrant itself was prepared for the District Court's signature by counsel for the Secretary, described the establishment and workplace only as "J. R. Simplot Company, Highway 19, about 2 Mi. West of Caldwell, Idaho," and contained the boiler plate general inspection language appearing in Section 8(a) of the Act:

> . . .YOU. . .ARE AUTHORIZED to enter the above described premises during regular working hours or at other

reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent, the aforesaid work site and business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls and facilities) bearing on whether this employer is furnishing to its employees employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the Occupational Safety and Health Standards promulgated under the Act in the rules, regulations, and orders issued pursuant to the Act."

Pursuant to that warrant, the Secretary's compliance officers conducted an inspection of the Simplot feedlot and potato-processing facilities commencing September 6, 1978 and continuing for 13 workdays. The inspectors spent the vast majority of their time in the Food Division where in fact they initiated the inspection.

As a result of that inspection the Secretary cited the company for a number of violations of Occupational Safety and Health standards. The company's timely contest of citations entitled it to a hearing before an administrative law judge of the

Occupational Safety and Health Review Commission. However, Simplot did not contest OSHA citations based upon alleged violations in the feedlot.

On both January 23 and February 26, 1979, Simplot moved before the administrative law judge to suppress evidence gathered during the inspections. Both motions were denied on the basis that (1) the warrant authorized a "wall-to-wall" search of Simplot's facilities, (2) Simplot consented to the search and (3) the exclusionary rule does not apply to OSHA proceedings. On April 6, Simplot moved in the District Court to suppress the evidence and for a temporary restraining order against the OSHA proceedings. While these motions were pending, on April 10th and 11th, the administrative law judge concluded the hearings on the alleged violations. On May 29, the District Court denied Simplot's motions, while granting an evidentiary hearing to determine the validity of the warrant. The hearing was held on August 31, 1979, and at its conclusion, the District Court ruled against Simplot. Simplot appealed to the Ninth Circuit Court of Appeals.

Meanwhile, on July 27, the administrative law judge ruled against Simplot in the OSHA case. Simplot's appeal of that decision to the Occupational Safety and Health Review Commision was denied. That denial was then appealed to the Ninth Circuit. The two cases before the Ninth Circuit were consolidated on appeal.

Jurisdiction of the appeal was based upon 28 U.S.C. Sections 1291 and 1294, and jurisdiction of the Petition for Review was based upon 29 U.S.C. Section 660(a).

Three issues were before the Ninth Circuit: (1) whether Simplot was required to exhaust its administrative remedies before seeking relief in the District Court; (2) whether, the warrant issued by the District Court was overbroad; and (3) whether, assuming the warrant was invalid, the exclusionary rule applies in OSHA proceedings.

With respect to the first issue, the Court of Appeals (Van Dusen, Farris and Boochever) held that Simplot's request for relief in the District Court was improper because the statutory review procedures for OSHA proceedings provided Simplot with an adequate remedy and required exhaustion of administrative remedies.

The Court of Appeals determined that it was not necessary to address the issue of whether an inspection following an employee complaint to OSHA must be restricted to the complained of site, but that it was only necessary to determine the legitimate scope of the warrant. The Court declined to invalidate the warrant as overbroad, holding that it was reasonable for the District Court to conclude based upon the warrant application that the Simplot premises constituted a single facility.

Finding the warrant to be valid, the Court of Appeals did not have to consider the applicability of the exclusionary rule to OSHA proceedings.

Simplot subsequently filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing en Banc which was denied by order of the Ninth Circuit dated June 22, 1981.

ARGUMENT

Review on Writ of Certiorari should be granted because the Court of Appeals failed to address directly the question of whether a warrant authorizing an OSHA inspection should be reasonably limited to alleged violative conditions when probable cause for the inspection is based solely on specific evidence of existing violations.

I
Probable Cause in the OSHA Context

The Occupational Safety and Health Act of 1970 (29 U.S.C. 657 et seq.) authorizes two types of inspection: Section 8(a) inspections which usually are done pursuant to some sort of a general administrative plan, and Section 8(f) inspections which usually result from an employee complaint. Under the standards set forth by this Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), there are two alternative methods for establishing probable cause for a warrant authorizing an OSHA inspection: (1) specific evidence of existing conditions

purportedly in violation of the Occuptional Safety and Health Act, or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Id. at 320-321.

Therefore, under the Barlow's standard, probable cause for an inspection may be based upon "specific evidence of an existing violation" such as Section 8(f)(1) employee complaint. Accord, Marshall v. Horn Seed Co., Inc., 647 F.2d 96, 100-104. (10th Cir. 1981). However, a warrant based upon an employee complaint may not issue without the issuing magistrate closely scrutinizing the information submitted in support of the application. Id.

II
Scope of an OSHA Inspection When Probable Cause for the Warrant is Based Upon an Employee Complaint

When probable cause is based upon specific violations set forth in an employee complaint, the warrant must tailor the inspection to the complained of site. Probable cause for a general inspection is not supported by an employee complaint about specific hazards.

Section 8(f)(1) of the Act specifically sets out the following procedure for employee complaints:

> ...If upon receipt of such notification the Secretary

> determines that there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.

29 U.S.C. 657(f)(1) (Emphases added). Where the warrant is based upon an employee complaint, the statute allows only a "special" inspection which must be limited to those specific areas complained of, which is allthat is necessary "to determine if such violation or danger exists." There is no authorization in that section for an unlimited, wall-to-wall search.

As the Court of Appeals below correctly noted (640 F.2d at 1137-1138), various courts have reached different results when faced with the question of how broad an inspection may be when probable cause is established by specific evidence of existing violations.

The most recent Court of Appeals case expressly held that under normal circumstances, a wall-to-wall inspection is not justified by an employee complaint:

> We hold that where an OSHA inspection is conducted under Section 8(f) pursuant to an employee complaint, the scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint.

Marshall v. North American Car Co., 626 F.2d 320, 324 3d Cir. 1980. See also, Marshall v. Central Mine Equipment Company, 608 F.2d 719, 720-721, n. 1 (8th Cir. 1979).

Similarly, in its most recent decision in this area, the Occupational Safety and Health Review Commission has decided that when probable cause for an inspection is based solely on an employee complaint, the inspection may not go beyond the scope of the alleged violation, where the precise location of the violation can be determined in advance. In re Sarasota Concrete Company, 9 O.S.H.C. 1608, 1617 (1981).

The only Court of Appeals case that has adopted a position contrary to the line of cases represented by Marshall v. North American Car Co., supra, involved hazards the locations and types of which were sufficiently diffuse so as to make reasonable a search of the entire work premises. Burkart Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313 (3rd Cir. 1980). (2-1 decision). In fact, two of the three judges in that case favored the general principle of limiting the scope of a search to the complained of areas. Id. at 1326-1328.

Of course, as indicated by the concurring opinion in Burkhart Randall, Id. at 1326, under exceptional circumstances where it is not possible to tailor the warrant to an inspection of limited areas, an employee complaint may justifiably support a general warrant.

For example, in a case in which the complained of hazard was one of inadequate ventilation, the location of which by its very nature was impossible to ascertain in advance with any degree of exactitude, a warrant authorizing a wall-to-wall hygiene inspection "admittedly broad because no meaningful limitation could be devised" was upheld. In re Establishment Inspection of Marsan Co., 1979 O.S.H. Dec. para. 23,856, at 28, 935 (N.D. Ind. 1979). The Seventh Circuit Court of Appeals has recognized this need for a broader warrant where "the exact location of violations cannot be known prior to entering the establishment." In the Matter of: Establishment Inspection of: Gilbert and Bennett Mfg. Co., 589 F.2d 1335 (7th Cir., 1979), cert. den., 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed. 2d 113 (1979).

The probable cause for a general inspection warrant may also exist where the violations complained of are so numerous and serious that the remedial purpose of the Occupational Safety and Health Act would be defeated by a limitation of the scope of the warrant. See, e.g., Marshall v. Berwick Forge and Fabricating Co., 474 F.Supp. 104 (M.D. Pa. 1979); Burkhart Randall Division of Textron, Inc., supra at 1326 (concurring opinion).

III

The Reasoning of the Court of Appeals Below

Based upon its belief that "the warrant application contained no facial

reference to two distinct Simplot-owned facilities", the Court of Appeals below held as follows:

> ...The district court inferred reasonably, although perhaps erroneously, that the Simplot plant located outside of Caldwell was a single facility. Operating under this inference, the district court authorized an inspection of the entire Simplot plant. In the absence of proof that the court's conclusion was either unreasonable or made in bad faith, we will not find the warrant invalid as overbroad. . . ."

640 F.2d at 1138.

(1) - <u>That the District Court reasonably inferred that the feedlot and food plant were one facility:</u>

This ruling disregards the fact that the employee complaint was very specific as to the location of the alleged violations, whereas the compliance officer's affidavit recited a very broad description (perhaps for jurisdictional purposes only) of the diverse business operations in which J. R. Simplot Company is involved in Interstate Commerce. By narrowly describing the worksite location of the alleged violations as the "Grain mill and fuel service truck", the kind of business as "Feedlot-Grain mill", located at "Feedlot no. 3 in Caldwell, Idaho, the employee complaint provided a very definitive basis for the District Court to distinguish the complained of

work site from the other diverse business operations conducted by Simplot, many of which (including the potato plant) were not even remotely related to the feedlot-grain mill business. Of course, the warrant itself was prepared by counsel for the Secretary and just happened to omit the specific identification of the employer's worksite as specified in the employee complaint, thereby bootstrapping an OSHA search of the potato plant and the feedlot, both of which could fall within the warrant's description of "J. R. Simplot Company Highway 19, about 2 Mi. West of Caldwell, Idaho." To conclude that the various Simplot operations were contained in one facility, one would have had to disregard altogether the contents of the employee complaint.

Therefore, the Court of Appeals erred in concluding that the District Court's inference was reasonable, based upon the warrant application, that the Simplot premises constituted a single facility.

(2) - <u>That a wall-to-wall warrant would be justified if the feedlot and food plant were contained in one facility:</u>

Of further and utmost importance is the fact that, by refusing to invalidate the warrant for the reason that the District Court reasonably concluded based upon the warrant application that the Simplot premises constituted a single facility, the Court

of Appeals had to decide a priori the very issue which it initally purported to avoid and in a manner contrary to the weight of authority: that a wall-to-wall inspection of a single facility would be supported by probable cause based upon specific evidence in the form of an employee complaint of existing violations, even if that facility were to include diverse business operations lacking any reasonable connection to the complained of areas. In other words, the court essentially determined that if the Simplot potato processing plant and feedlot had been contained in one facility, a wall-to-wall warrant would have been justified even though the employee complaint identified violations existing only in the feedlot.

In the case at issue there were no special circumstances (e.g., numerous violations; locations of violations not ascertainable in advance; etc.) that must justify a general warrant based upon an employee complaint. (See discussion, supra, pp. 11-12). Furthermore, because the OSHA citations at the feedlot were not contested, this case does not involve the issue of whether within that particular facility the inspection should have been limited to the complained of site. If the Court of Appeals incorrectly concluded that it was reasonable for the District Court to infer that the various work premises constituted a single facility, then the issue involved is whether search of an unrelated and physically distinct work site is justified by an employee complaint as to specific violations found in a separate work site.

IV

The Petition for Writ of Certiorari Should Be Granted

(1) The decision of the Court of Appeals is a marked departure from the accepted and usual course of judicial proceedings.

No other court which has been faced with the "scope of the search" issue has ever seen fit to sidestep the issue in the manner attempted by the Court below. See, e.g., Marshall v. North American Car Co., supra; Burkart Randall Division of Textron, Inc. v. Marshall, supra. Furthermore, no other court that has authorized a wall-to-wall inspection based on an employee complaint has ever ratified a search of two separate and unrelated business establishments when the complained of area was limited solely to one of the two.

(2) The decision of the Court of Appeals conflicts with the decision of another court of appeals in the same matter.

As noted above (supra, 13-14), an inference based upon the warrant application that the Simplot food plant and feedlot consisted of one facility would require a disregard of the employee complaint specifically identifying the alleged violations. The Court of Appeals' decision that the District Court's inference was reasonable (640 F.2d at 1138) defeats

the probable cause requirement that information tendered in support of the warrant application be closely scrutinized before issuance of a warrant. See Marshall v. Horn Seed Co., Inc., supra.

Furthermore, the Court of Appeals' "single facility" standard (640 F.2d at 1138), i.e., that a search of the entire food plant would be justified by a complaint of violations in the feedlot, as long as the food plant and feedlot constituted a single facility, is contrary to the weight of authority represented most prominently by the Seventh Circuit's decision in Marshall v. North American Car Co, supra, that an OSHA inspection must be reasonably related to complained of areas, and may well go even beyond the leading case authorizing broader OSHA inspections in the context of employee complaints, Burkart Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313, 1313-1326 (3d Cir. 1980). It most certainly goes well beyond the concurring opinion in Burkhart Randall which considered reasonable a wall-to-wall search only because of the "locations and types of hazards named in the employee complaints." Id. at 1326.

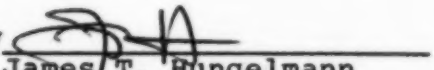
3. The decision of the Court of Appeals involves an important question of federal law which has not been, but should be, settled by the United States Supreme Court:

This split in the cases, involving even courts of appeal, has never previously been addressed by this

Court. Now, however, there is before this Court a case involving a wall-to-wall search not just of one business operation (i.e., feedlot), but of two separate and distinct operations (i.e., food plant and feedlot). This Court is thus presented with a unique opportunity for resolution of the controversy of how reasonably the searched areas must relate to the complained of areas.

In conclusion, the Petition for Writ of Certiorari should be granted in order that the important federal question of whether an OSHA warrant based upon an employee complaint must restrict the inspection to the complained of site.

Respectfully submitted,

By 

James T. Hungelmann
Assistant General Counsel
J. R. Simplot Company
P. O. Box 27
Boise, Idaho 83707
(208) 336-2110

Attorney for Petitioner

Dated September 21, 1981.

APPENDIX INDEX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of Establishment of: J. R. SIMPLOT COMPANY, a corporation.	)	No. 79-4750
J. R. SIMPLOT COMPANY, a Nevada corporation, Petitioner/ Appellant,	)	
vs.	)	No. 79-7596
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, and U. S. DEPARTMENT OF LABOR, Respondents/ Appellees.	)	ORDER

Before: VAN DUSEN*, FARRIS and BOOCHEVER, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

*Honorable Francis L. Van Dusen, Senior United States Circuit Judge of the Third Circuit, sitting by designation.

Judges Farris and Boochever have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

In the Matter of Establishment Inspection of J. R. SIMPLOT COMPANY, a corporation.

J. R. SIMPLOT COMPANY, a Nevada corporation, Petitioner/Appellant,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, and U. S. Department of Labor, Respondents/Appellees.

Nos. 79-4750, 79-7596.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 7, 1980.

Decided April 3, 1981.

Appeal from the United States District Court for the District of Idaho.

Before VAN DUSEN,* FARRIS and BOOCHEVER, Circuit Judges.

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*Honorable Francis L. Van Dusen, Senior United States Circuit Judge, for the Third Circuit, sitting by designation.

FARRIS, Circuit Judge:

J. R. Simplot petitions this court for review of a final order issued by the Occupational Safety and health Review Commission (OSHRC) denying Simplot's petition for review, and appeals from an order issued by the district court in the district of Idaho denying Simplot's motion to suppress evidence in the OSHA proceedings. We affirm.

FACTS

J. R. Simplot is composed of two corporate divisions: The Food Division, engaged in the processing of potatoes, and the Feed Lot Division, engaged in cattle feeding. The two divisions are located on opposite sides of Highway 19, two miles outside of Caldwell, Idaho. On May 18, 1978, an OSHA compliance officer arrived at the Simplot plant to investigate a complaint registered by a Simplot employee, who alleged the existence of a leaking fuel service truck and unapproved electrical fixtures in the wheat mill, both located in the Feed Lot. The officer presented the complaint to Herman Teich, a supervisor of the Food Division. After consulting with counsel, Teich denied the officer entry on the grounds that he lacked a warrant.

On August 31, OSHA applied to the district court for an inspection warrant. This application was supported by the compliance officer's affidavit

and a copy of the employee complaint, which listed the specific alleged violations at the Feed Lot. The court issued the warrant on September 5. The warrant authorized entrance to "J.R. Simplot Company" on Highway 19", and authorized inspection with respect to all "pertinent" facilities to determine whether Simplot was "complying with the . . . Act." No distinction was made between the Food and Feed Lot Divisions.

On September 6, OSHA agents began inspecting the Simplot facilities. Accompanied by Teich, the agents spent 13 days inspecting the Food and Feed Lot Divisions. On October 19 and 23, the Secretary of Labor cited Simplot for violations existing in both facilities. Simplot contested the citations and the case was assigned to an administrative law judge of OSHRC.

On both January 23 and February 26, 1979, Simplot moved before the ALJ to suppress evidence gathered during the inspections. Both motions were denied on the basis that (1) the warrant authorized to a "wall-towall" search of Simplot's facilities, (2) Simplot consented to the search and (3) the exclusionary rule doesn't apply to OSHA proceedings. On April 6, Simplot moved in the district court to suppress the evidence and for a temporary restraining order against the OSHA proceedings. While these motions were pending, on April 10 and 11, the ALJ concluded the hearings on the alleged violations. On May 29, the district court denied

Simplot's motions, while granting an evidentiary hearing to determine the validity of the warrant. The hearing was held on August 31, and at its conclusion, the district court ruled against Simplot. Simplot appealed.

Meanwhile, on July 27, the ALJ had issued a decision adverse to Simplot in the OSHA case. Simplot appealed that decision to OHRC, which denied the appeal. Simplot then appealed OSHRC's denial of review to this court.

Three issues are before the court: (1) whether Simplot was required to exhaust its administrative remedies before seeking relief in the federal district court; (2) whether the warrant issued by the district court was overbroad; and (3) whether, assuming the warrant was invalid, the exclusionary rule applies to OSHA proceedings.

I. Exhaustion of Administrative Remedies

As indicated above, this case comes before us on two sepearate appeals: (1) from the district court's judgment upholding the warrant, and (2) from OSHRC's denial of review of OSHA's decision adverse to Simplot. We first must decide whether it was proper for Simplot to seek relief in the district court without exhausting its administrative remedies.

Generally, a party must exhaust

its administrative remedies before seeking relief from or review of an agency decision. See, e.g., Lloyd C. Lockrem, Inc. v. United States, 609 F.2d 940, 942 (9th Cir. 1979); Eluska v.Andrus, 587 F.2d 996, 999 (9th Cir. 1978). Exhaustion is not required, however, if the administrative remedies are either inadequate or inefficacious. Aleknagik Natives Ltd. v. Andrus, ___ F.2d ___ No. 78-2986, slip op. at 2652 (9th Cir. Apr. 7, 1980). Simplot contends that, because OSHRC had refused to address constitutional claims at the time of the OSHA proceedings, OSHRC lacked expertise as to the claim, thereby rendering the administrative remedy inadequate, see, e.g., Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 376-77 (7th Cir. 1979). For this reason, Simplot concludes that it was justified in seeking relief in the federal district court.

We disagree. Although OSHRC refused resolution of the constitutional claims during the pendency of the OSHA proceedings, see Electrocase Steel Foundry, Inc., 1978 O.S.H. Dec. Para. 22,702, at 23,401 (O.S.H. Rev. Comm'n Apr. 21, 1978), the ALJ twice addressed Simplot's constitutional arguments. Moreover, the statutory review procedure provided for OSHA proceedings, which authorizes OSHRC to review the ALJ's determinations, affords Simplot the right to have this court review any order issued by OSHRC. 29 U.S.C. Sec. 660(a) (1976 & Supp. II 1978); 29 C.F.R. Sec. 2200.90 (1979). Even assuming that OSHRC lacked sufficient expertise to

resolve Simplot's constitutional arguments, this statutory review procedure adequately assures Simplot of this court's consideration of any alleged constitutional violations. Because the review procedure for OSHA proceedings provided Simplot with an adequate remedy, and because this statutory procedure contemplates exhaustion of the administrative remedies, Simplot improperly sought relief in the federal district court. See Montgomery v. Rumsfeld, 572 F.2d 250, 252-53 (9th Cir. 1978); see also Marshall v. Whittaker Corp., 610 F.2d 1141, 1148 (3d Cir. 1979); Babcock & Wilcox Co. v. Marshall,. 610 F.2d 1128 (3d Cir. 1979); Marshall v. Central Mine Equipment Co., 608 F.2d 719, 722 (8th Cir. 1979); In re Worksite Inspection of Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979).

II. The Warrant's Validity

We now address the merits of Simplot's appeal from OSHRC's adverse ruling. Simplot concedes that the complaint registered by the Simplot employee was sufficient under Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21, 98 S.Ct. 1816, 1824, 56 L.Ed.2d 305 (1978), to establish probable cause to conduct a complete inspection of the Feed Lot, the complained of site. Simplot argues, however, that because the warrant authorized an inspection of the entire Simplot facility, including both the Feed Lot and the Food Division, the warrant was overbroad, and therefore invalid under the Fourth Amendment.

Both Simplot and the Secretary would have this court address the issue of whether an inspection following an employee complaint to OSHA must be restricted to the complained of site. As both parties have noted, the various courts addressing this issue have reached different results. While some courts require inspection warrants to be limited in scope, if possible, to the complained of site, other courts have concluded that, once probable cause is established by an employee complaint, OSHA may conduct a "wall-to-wall" inspection of the employer's facilities. Compare Marshall v. North American Car Co., 626 F.2d 320, 322-24 (3d Cir. 1980); Marshall v. Trinity Industries, Inc., 1979 O.S.H. Dec. Para. 23,943, at 29,040-41 (W.D.Okl. Oct. 15, 1979; Whittaker Corp. v. OSHA, 1979 O.S.H. Dec. Para. 23,381 (M.D.Pa. Mar. 7, 1978), dismissed mem., 594 F.2d 855 (3d Cir. 1979); and Sarasota Concrete Co., 1979 O.S.H. Dec. Para. 23,839, at 28,295 (O.S.H.Rev. Comm'n Sept. 9, 1979), with Burkart Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313, 1322-26 (7th Cir. 1980); In re Establishment Inspection of Marsan Co., 1979 O.S.H. Dec. Para. 23,856, at 28,935 (N.D.Ind. June 21, 1979); and Dravo Corp. v. Marshall, 5 O.S.H. Cas. 2057 (W.D.Pa. 1977), aff'd mem., 578 F.2d 1373 (3d Cir. 1978).

We need not address this broad issue, however, as the facts here require us to do no more than determine

the legitimate breadth of the warrant issued by the district court. In determining the validity of a criminal search warrant, we are limited to the information and circumstances that were available to the issuing officer at the time the warrant was issued. United States v. Brown, 455 F.2d 1201, 1204 (9th Cir.), cert. denied, 406 U.S. 960, 92 S.Ct. 2069, 32 L.Ed.2d 347 (1972). Applying this principle here, the proper scope of the inspection warrant is to be determined by considering the information presented to the district court in the warrant application.

Here, the warrant application consisted of two documents: the affidvit of the OSHA compliance officer, and a written copy of the complaint registered by the Simplot employee. The affidavit noted the initial inspection attempt of "the J. R. Simplot Company, . . . located on Highway 19 about two miles west of Caldwell, Idaho," following the OSHA regional office's receipt of the employee complaint, which was annexed to the affidavit as "Attachment A." The affidavit also stated that the affiant believed that the nature of Simplot's business consisted of the "mining, growing, raising, processing and distributing of agricultural products such as potatoes, grain, cattle, and fertilizers." The employee complaint listed the employer as "J. R. Simplot, Feedlot No. 3," located on "Highway 19 about 2 Mi. West of Caldwell." The words "Feedlot-Grain mill" were typed in the space requiring specification of the

employer's "kind of business;" the words "Grain mill and fuel service truck" were typed in the space requiring specification of the worksite containing the alleged violations.

The warrant application contained no facial reference to two distinct Simplot-owned facilities. The employee complaint described the employer as the Simplot Feedlot-Grainmill, located two miles outside of Caldwell; the OSHA officer's affidavit described the Simplot facilities, which were the initial subject of inspection, as being located two miles outside of Caldwell. The district court could properly draw reasonable inferences from this information. United States v. Spearman, 532 F.2d 132, 133 (9th Cir. 1976). The district court inferred reasonably, although perhaps erroneously, that the Simplot plant located outside of Caldwell was a single facility. Operating under this inference, the district court authorized an inspection of the entire Simplot plant. In the absence of proof that the court's conclusion was either unreasonable or made in bad faith, we will not find the warrant invalid as overbroad. United States v. Whitney, 633 F.2d 902, 906-08 (9th Cir. 1980) (upholding criminal search warrant describing premises to be searched as single building when in fact premises contained two units).

Further, the OSHA affidavit is not susceptible to attack as an attempt to mislead the district court regarding

the composition of the Simplot facilities. Although the affidavit arguably omitted any mention of the existence of two distinct Simplot owned facilities, Simplot has not alleged that the omission, if any, was the product of either a deliberate falsehood or reckless disregard for the truth. We are therefore unable to invalidate the warrant as being based on a misleading affidavit. See Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978); United States v.Whitney, 633 F.2d 902, 908 (9th Cir. 1980); United States v. Young Buffalo, 591 F.2d 506, 510 (9th Cir.), cert. denied, 441 U.S. 950, 99 S.Ct. 2178, 60 L.Ed.2d 1055 (1979).

Because the warrant was valid, we need not consider the applicability of the exclusionary rule to OSHA proceedings.

Affirmed.

IN REFERENCE TO SECRETARY OF LABOR

V.

J. R. SIMPLOT COMPANY

OSHRC DOCKET NO. 78-4510

NOTICE IS GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Baruch A. Fellner
Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW, Rm. S-4014
Washington, D. C. 20210

Robert A. Friel, Esq.
Associate Regional Solicitor, USDOL
8003 Federal Office Bldg.
Seattle, Washington 98174
Attn: William W. Kates, Esq.

FOR EMPLOYER

Dennis R. Jones, Esq.
One Capital Center
P. O. Box 27
Boise, Idaho 83707

NOTICE OF FINAL ORDER

The petition for discretionary review filed by Respondent was received by the Commission on 9-13-79.

The petition having come on to be con-

sidered by the individual Commission Members and no Commission Member having directed review, the petition is deemed to be denied and the decision of the Administrative Law Judge is a final order of the Commission. Rule 90(b)(3), 29 CFR Sec. 2200.90(b)(3). Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 661(i).

FOR THE COMMISSION

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE ESTABLISHMENT INSPECTION OF:	)))	CASE NO. M-S-1873 (CIRCUIT CRT. 79-4750)
J. R. SIMPLOT COMPANY, a corporation,	)))	REPORTER'S TRANSCRIPT

Reporter's Transcript of proceedings held August 31, 1979, at Boise, Idaho, before the HONORABLE RAY McNICHOLS, United States District Judge, District of Idaho, at Boise, Idaho.

***

I am satisfied that it is now the rule of law adopted in this Court, until someone tells us differently, that upon a proper issuance, of a warrant for a business situs, that a wall-to-wall type of inspection may be made. It is unusual for any Court to assume jurisdiction to interfere once the Administrative process starts and the usual course and the approved course of action is to wait until the end of the Administrative process and then have an appeal to the Court.

Those are not totally satisfactory arrangements for parties involved with OSHA, but I am satisfied that is the general and proper rule of law that the Court must follow.

So unless there was a very unusual situation here, I would not attempt to interefere.

I would have to say to the OSHA people that had they said to me, the Simplot people have two different businesses out there and we have a complaint against one, and we would like a warrant to search them both, or to inspect them both, I believe I would have said no. That there was not a showing to inspect the Food Processing Division.

However, the Agency in this function and I don't believe that there was a deliberate attempt to misuse and abuse the Court's process. I am inclined to think that they thought they were doing the right thing. At least they did not feel that they were going to get the wrath of the Court over it.

The Simplot Company is a sophisticated company. Their counsel were aware of the issuing of the warant and they did not go into any background before they approved inspection. I don't think that you can say that there was a genuine waiver, because there was some -- well, the employees knew all the facts and knew the background of the whole matter.

Now, all of this leads me to the position that there has not been a sufficient abuse of the process of this

Court that would cause me to exercise an unusual form of jurisdiction that I might have to interefere in this Administrative procedure.

Therefore, the Motion to Suppress and the Motion to Reconsider will each be denied.

***

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SECRETARY OF LABOR,	)	
	)	DECISION AND
Complainant,	)	ORDER
	)	OSHRC DOCKET
vs.	)	NOS. 78-5192
	)	AND 78-5193
J. R. SIMPLOT COMPANY,	)	
	)	
Respondent.	)	
	)	

Appearances: William W. Kates, Esq.
Seattle, Washington, for
Complainant.

Dennis R. Jones, Esq.
Boise, Idaho for
Respondent.

JERRY W. MITCHELL, Judge.

This proceeding involves issues of whether J. R. Simplot Company (Simplot) was in violation of applicable safety standards at its Caldwell, Idaho, plant during the period from 13 to 19 September 1978.

***

LAW AND OPINION

Consolidation of Dockets 78-5192 and 78-5193 --

With the agreement of the parties, the two Dockets were consolidated at the beginning of the trial. (Tr. pg. 1.)

SIMPLOT'S MOTION TO SUPPRESS AND FOR DISCOVERY --

These motions, first filed by Simplot on 23 January 1979, were the subject of extensive argument during two telephone pretrial conferences involving the parties. The motions were denied in an Order entered on 14 February. The Motion to Suppress, renewed by Simplot on 26 February, was again denied in an Order entered on 28 March.

On 6 April, during a telephone pretrial conference arranged by Simplot, Simplot made an Oral Motion for a Stay pending the outcome of a Motion to Suppress evidence which Simplot intended to file in the U. S. District Court later that day. When the oral motion was denied, Simplot advised that it would seek a Temporary Restraining Order. The denial of the Motion for a Stay was formalized in an Order signed on 9 April and served on the parties at the beginning of the trial in Secretary v. Simplot, Docket No. 78-4510, on 10 April.

At the beginning of the trial in Docket 78-4510 on 10 April, counsel for the Secretary advised that late on

the afternoon of 9 April, U. S. District Judge McNichols had denied Simplot's Motion for a Temporary Restraining Order.

As the trial in these two Dockets opened on the afternoon of 10 April, Simplot again renewed its Motion for Suppression of Evidence and Discovery. These motions were <u>again</u> denied.

Since Simplot has not renewed the motions, or even mentioned them in the post-trial brief filed in these cases, the motions will not be discussed further here. The reason for denying the motions are fully set forth in my Order entered on 28 March and filed in the file for each Docket.

***

<u>ORDER</u>

Based upon the foregoing Findings of Fact, Conclusions of Law, and for good cause shown, it is

<u>ORDERED</u> that:

1. Simplot's Motion to Suppress Evidence and for a discovery deposition be, and hereby is DENIED in each Docket;

***

JERRY W. MITCHELL
Judge, OSHRC
Burlingame, CA

DATED: 16 August 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE ESTABLISHMENT INSPECTION OF:	)	CASE NO. M-S-1873
J. R. SIMPLOT COMPANY, a corporation,	)	REPORTER'S TRANSCRIPT

Reporter's Transcript of proceedings held May 29, 1979, in Boise, Idaho, before the HONORABLE RAY McNICHOLS, United States District Judge, District of Idaho, at Boise, Idaho.

***

THE COURT: Well, let me get to the nitty gritty of the matters here.

I am going to reject your petition to suppress based upon the initial analysis of the case. In other words, I am not going to exercise my so-called anomalous jurisdiction to interfere with the administrative process, but two things are happening. One, we have a rehearing coming right now in this Court on a wall-to-wall search based on an employee's complaint that may have some bearing on this when I make the decision on it. Two, I want to offer you the opportunity if you want to petition for an evidentiary hearing on the question of whether or not the processes of this Court were abused in the obtaining of the warrant and the use

of it as such aside frm the breadth of it which is the wall-to-wall concept.

I will offer you an opportunity to, one, petition with that and brief it and then the Government can then answer, and then in the meantime perhaps the Government's decision may come down from above and it may be satisfactory to you and the whole thing may become moot. however, if you say you doubt it, I will share your doubt with you.

At any rate, I think you ought to have that opportunity to present evidence to the question both by your own people as to what happened and by following the Government officials because I am very interested in -- I have liberally construed the Act and interpretations I have put on Barlow have been more liberal than some courts, and I am not going to allow the matter to be abused.

Your initial application is denied upon the ground of merely allowing the question of suppression now to be heard by this Court after it started through the administration process. I will leave over for another day the question of whether or not the processes of this Court were abused and I should therefore exercise the jurisdiction necessary to protect that and I will offer you an evidentiary hearing on that question if you decide you want it at a good time on both sides to hear the matter fully.

***

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,	)	ORDER DENYING
	)	MOTION TO
Complainant,	)	SUPPRESS
	)	EVIDENCE
v.	)	
	)	OSHRC DOCKET
J. R. SIMPLOT COMPANY,	)	NOS. 78-4510
	)	and 78-5192
Respondent.	)	
	)	

On 23 January 1979, Respondent J. R. Simplot Company (Simplot) filed (1) a Motion for Discovery and the Taking of the Deposition of Jerry L. Conn and (2) a Motion to Suppress Evidence. The two motions, both opposed by the Secretary of Labor (the Secretary) and thoroughly discussed in two telephone pretrail conferences, were DENIED during the second telephone pretrial conference on 13 February and in an Order entered on 14 February.

On 26 February, Simplot again filed a Motion to Suppress Evidence to which the Secretary has filed a response, opposing it.

A chronology of the events giving rise to the motion at issue here shows that:

1. At approximately 0830 on 18 May 1978, a Compliance Officer of the Occupational Safety and Health Administration arrived at the J. R. Simplot Company establishment located on Highway 19 about two miles west of Caldwell, Idaho. The Compliance Officer informed management representatives that he desired to make an inspection of their worksite. He also advised them that OSHA had received an employee complaint and gave a copy of that complaint to management. The identity of the employee was not divulged. After consulting with Simplot legal counse, the management representative advised the Compliance Officer that a search warrant would be required before an inspection of the worksite would be permitted. The Compliance Officer departed from the worksite at approximately 0915 without conducting the inspection.

2. Subsequently, on 31 August, the Secretary applied to the United States District Court for the District of Idaho for an Inspection Warrant. The application for the Inspection Warrant was supported by an affidavit of the Compliance Officer who had been refused admission to the worksite. In that affidavit the Compliance Officer described the receipt of an employee complaint about hazardous work safety conditions at Simplot's feedlot and grain mill. A copy of the affidavit was attached to the application.

3. On 5 September, United

States District Judge Ray McNichols issued a Warrant for Inspection of the J. R. Simplot workplace.

4. Pursuant to the Warrant for Inspection, representatives of the Secretary returned to the Simplot establishment in early September and were granted entry. They were permitted to inspect the feedlot, grain mill, and food procesing plant without objection.

5. After the issuance of citations to Simplot for alleged safety violations, Simplot contested those citations and has moved to suppress evidence in this ensuing proceeding before the Occupational Safety and Health Review Commission.

SIMPLOT'S ARGUMENT --

Simplot's thesis goes thusly:

1. The original inspection was attempted in response to an employee complaint;

2. The employee complaint only involved the feedlot and the grain mill;

3. The affidavit in support of the Application for an Inspection Warrant did not mention the Food Processing Plant;

4. Therefore, the Warrant for Inspection issued by Judge McNichols must be assumed to have been issued for the purpose of inspecting the feedlot and grain mill only.

Simplot would bolster this thesis by asserting that the facts of the case reveal that in reality, the real focus of the inspection was not on the feedlot or the grain mill at all but rather on the food processing facility. This assertion is based on the fact that the inspectors only spent several hours at the feedlot and grain mill during the inspection under the Warrant while they spent approximately 13 days inspecting the other facilities. Putting the foregoing thesis and the above bolstering facts together, Simplot would have the evidence obtained during the inspection under the warrant suppressed.

DISCUSSION --

1. Authority of the Review Commission -

The Commission has held, "... that it is not within our authority to rule on the validity of a search warrant issued by a U. S. Magistrate." Secretary v. Electrocast Steel Foundry, Inc., 78 OSAHRC 34/B7; 6 OSHC 1562 (BNA); 1978-79 OSHD 22,702 (CCH); Docket No. 77-3170. The First Circuit has accepted this holding by the Review Commission. Quality Products, Inc., Review Commission Docket No. 78-1232; 1978-79 OSHD 23,328; (1st Cir. Feb. 16, 1979).

If the Commission is without authority to rule on the validity of a search warrant issued by a Magistrate who is actually a part of the District Court system, it obviously cannot rule

on the validity of a warrant issued directly by the District Court. The warrant involved here was issued by a United States District Judge for the District of Idaho. Thus, there can be no review of that warrant in this instance.

However, at the same time, it must be noted that Simplot is required to exhaust its administrative remedies in this proceeding in order to preserve them for any possible future appeal. Weyerhaeuser Co. v. Marshall, Review Commission Docket No. 78-2013; 1978-79 OSHD 23,325; (7th Cir. Feb. 9, 1979). Having filed two motions to suppress evidence, Simplot has adequately preserved that issue.

2. Under Barlow's the Warrant for inspection was valid -

Even though the Review Commission does not have authority to rule on the validity of a warrant for inspection, it is noted that the facts extant here show that the Warrant for Inspection issued by Judge McNichols was fully justified. Barlow's holds that for administrative searches such as the one involved here, probable cause justifying the issuance of a warrant may be based on specific evidence of an existing violation. Marshall v. Barlow's Inc., 98 S.Ct. 1816, 1824 (1978).

The application for the warrant which is at issue here, included an affidavit asserting that the Secretary had received a complaint from a Simplot employee detailing certain hazardous conditions at the worksite. The complaint had been reduced to writing and a copy furnished to Simplot at the time the first attempt at inspection was refused. A copy of that complaint was also attached to the application for the warrant and was available to Judge McNichols at the time he issued the Warrant for Inspection. Thus there was probable cause for the issuance of the warrant. In the Matter of: Establishment Inspection of: Gilbert & Bennett Manufacturing Company, 589 F.2d 1335, 1339 (7th Cir. 1979).

3. The warrant limited the inspection to Simplot's Caldwell business -

The application for the warrant identified the establishment for which the warrant was sought as the J. R. Simplot worksite and business located on Highway 19 about two miles west of Caldwell, Idaho. The application stated, "That the inspection and investigation will extend to the aforesaid establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions..."

As issued, the warrant authorized duly designated representatives of the Occupational Safety and Health Administration to enter the workplace, described as "J. R.

Simplot Company, Highway 19 about 2 miles west of Caldwell, Idaho" to inspect and investigate the worksite. Certain limitations as to the time and manner of making the inspection were set forth in the Warrant for Inspection signed by Judge McNichols.

There is nothing in the application for the warrant, nor in the warrant itself, which would limit the inspection to the feedlot and grain mill. It is true that the employee complaint only mentioned those two locations, but that does not in any way limit the scope of the warrant. The warrant, on its face, permits entrance of the described premises and that is the way the inspection is carried out.

4. No suppresion of evidence in civil proceedings -

In this proceeding, Simplot is attempting to suppress all evidence obtained as the result of a valid inspection of its facility. Such suppression is without precedent. Subsequent to the Barlow's decision, supra, the Ninth Circuit noted in dealing with this issue, "...that [because] the Supreme Court has never applied the exclusionary rule in a civil proceeding suggests that the rule should not be applied to OSHA proceedings". Todd Shipyards Corporation v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978). In another case involving OSHA, the First Circuit was a bit more cautious in its conclusion on this point. In a recent case, the First

Circuit stated, "...that only in the most extraordinary circumstances, if at all, may suppression motions be entertained in this class of cases." Quality Products, Inc., supra.

5. Simplot did not object to the inspection -

Although Simplot now objects to the inspection, it did not do so at the time the representatives of the Secretary returned with the Warrant for Inspection issued by Judge McNichols. It is apparent that at that time, Simplot simply permitted those representatives to enter upon the company premises without posing any objection what- soever. Certainly, if Simplot felt that the warrant did not extend to the Food Processing Plant, the time to object was when the inspectors finished with the foodlot and grain mill and moved to the other facility. They did not do so. Since there was no objection to the inspection of the Food Processing Plant at tha time, and because consensual inspections are not unconstitutional, Simplot's argument fails. Marshall v. Barlow's, supra, Dorey Electric Co. v. OSHRC, 553 F.2d 357, 358 (4th Cir. 1977); Marshall v. Western Waterproofing Co., Inc., 560 F.2d 947, 950-51 (8th Cir. 1977).

ORDER

Accordingly, since the foregoing five points of discussion clearly demonstrate that Simplot's motion and supporting arguments are

without merit Simplot's Motion to Suppress Evidence must be, and hereby is, DENIED.

JERRY W. MITCHELL
Judge, OSHRC
Burlingame, CA

DATED: 28 March 1979

M. Karl Shurtliff
United States Attorney
District of Idaho
Room 698, Federal Building
550 West Fort Street
Boise, Idaho 83724
(208) 384-1211

Robert A. Friel
Associate Regional Solicitor
William W. Kates, Attorney
U. S. Department of Labor
Office of the Solicitor
8003 Federal Office Bldg.
Seattle, Washington 98174
(206) 442-0940

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of)) Establishment) No. M-S-1873 Inspection of:) WARRANT FOR J. R. SIMPLOT) INSPECTION COMPANY, a corpora-) tion, Highway 19) about 2 miles west) of Caldwell, Idaho,))	

TO: Area Director
Boise Idaho Area Office
Occupational Safety and
Health Administration
U. S. Department of Labor

Application having been made, and Court finding there is sufficient cause to permit entry for inspection and investigation at the establishment and workplace described as:

J. R. Simplot Company
Highway 19 about 2 miles
west of Caldwell, Idaho

IT IS HEREBY ORDERED that pursuant to section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. 651, et seq.) hereinafter referred to as the Act, YOU OR OTHER DULY DESIGNATED REPRESENTATIVES of the Occupational Safety and Health Administration, U.S. Department of Labor, ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent, the aforesaid worksite and business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards promulaged under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within fifteen (15) days after entry hereof.

DATED This 5th day of September, 1978.

Ray N. McNichols
UNITED STATES DISTRICT JUDGE

RETURN

Inspection of the establishment described in this warrant was made on _____.

Area Director
U. S. Department of Labor
Occupational Safety and Health
Administration
1315 West Idaho Street
Boise, Idaho 83706

M. Karl Shurtliff
United States Attorney
District of Idaho
Room 698, Federal Building
550 West Fort Street
Boise, Idaho 83724
(208) 384-1211

Robert A. Friel
Associate Regional Solicitor

William W. Kates, Attorney
Office of the Solicitor
U. S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174
(206) 442-0940

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of Establishment Inspection of:	)	Civil No. M-S-1873
J. R. Simplot Company, a corporation, Highway 19, 2 miles west of Caldwell, Idaho	)	APPLICATION FOR AN INSPECTION WARRANT

COMES NOW the United States of America, United States Department of Labor, Occupational Safety and Health Administration, by and through the undersigned Attorney, and applies to this Court for an inspection warrant

pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. 651 et seq.) hereinafter referred to as the Act, and in support of such Application alleges, upon information and belief, as follows:

1. That J. R. Simplot Company, a corporation, is engaged in the operation of a worksite and business location on Highway 19 about two miles west of Caldwell, Idaho, where work is performed by employees of the employer engaged in the mining, growing, raising, processing and distributing of agricultural products and is otherwise engaged in a business affecting commerce within the meaning of Section 3 of the Act. This has been true at all times pertinent hereto.

2. That the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8(a) of the Act, all as more fully described in the attached Affidavit of Jerry L. Conn filed herewith.

3. That the inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 C.F.R. Part 3. Appropriate credentials as representatives of the Occupational Safety and Health Administration, U.S.

Department of Labor, hereinafter referred to as representatives, presented to the employer, and the inspection and investigation will be commenced as soon as practicable after the issuance of this warrant and will be completed within reasonable promptness.

4. That the inspection and investigation will extend to the aforesaid establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act.

5. That the representatives may be accompanied by one or more employees of the employer, pursuant to Section 8(e) of the Act.

6. That a return will be made to the Court at the completion of the inspection and investigation.

7. That on or about May 18, 1978, at and about said location, a duly designated representative of the Secretary of Labor, pursuant to and in accordance with the Act, presented himself to the owner, operator, or agent in charge thereof for the purpose of conducting safety and health inspection at said location under the authority of the Act. At the attempt to carry out said purpose, said representative was refused entry upon the premises by Mr. Herman Teich. More particular details of such refusal are set forth in the Affidavit of Jerry L. Conn filed herewith.

WHEREFORE, applicant prays that this Court enter an Order in the form annexed hereto.

DATED This 31st day of August, 1978.

Carin A. Clauss
Solicitor of Labor

Daniel W. Teehan
Regional Solicitor

Robert A. Friel
Associate Regional Solicitor

By_____
WILLIAM W. KATES

AFFIDAVIT

STATE OF IDAHO)
) ss
COUNTY OF ADA)

JERRY L. CONN, being first duly sworn on oath, deposes and says:

1. That I am now and at all times material hereto have been a Compliance Safety and Health Officer of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, with offices at 1315 West Idaho, Boise, Idaho 83706. My duties and responsibilities as a Compliance Safety and Health Officer include the making of safety and health inspections of worksites under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C.A sections 651 et seq.), hereinafter referred to as the "Act."

2. That on May 18, 1978, I arrived at the work establishment maintained by the J.R. Simplot Company, located on Highway 19 about two miles west of Caldwell, Idaho 83605. The purpose of my visit was to conduct a safety and health inspection of such establishment, pursuant to the authority of section 8 of the Act and instructions from the Area Director, Boise, Idaho area office.

3. That the inspection was attempted to be made in response to a verbal complaint alleging possible violations of the Act and requesting such an inspection, all pursuant to section 8(f)(1) of the Act. Such complaint as made on May 17, 1978, by telephone call to the OSHA Office in Boise from an employee of the J. R. Simplot Company. That employee fuly identified himself to representatives of the Secretary but requested that his identity be kept confidential as provided in section 8(f)(1) of the Act. The substance of the complaint was reduced to written form by representatives of the Secretary, and a copy of the complaint in such written form is attached hereto as (Attachment A).

4. Upon my arrival at the worksite at approximatly 8:30 a.m., I met and introduced myself to Mr. Herman Teich, who identified himself as the company safety engineer. I presented to him my credentials as an OSHA Compliance Safety and Health Officer and explained to him the purpose of my visit, namely to make an inspection of the worksite. I further gave Mr. Teich a copy of the complaint which had been received. Mr. Teich instructed me to wait a few minutes in order for him to discuss this with the company's legal advisor in Boise, Idaho. Mr. Teich returned about 9:10 a.m. and informed me that Mr. Beebe, the company attorney in Boise, Idaho, had instructed him to require a search warrant before an inspection would be permitted. Accordingly, I left the worksite at approxiamtely 9:15 a.m.

5. My entry into the worksite for the purpose of making a safety and health inspection was not refused by reason of unreasonable time, limit, manner or any other basis provided for by the Act, but was refused solely for reasons stated above.

6. From my reviewing of previous inspection files, I believe that the nature of the business conducted by the J. R. Simplot Company, consists of mining, growing, raising, processing and distributing of agricultural products such as potatoes, grain, cattle, and fertilizers of which some phosphate materials are imported from Brandon, Canada, thus subjecting the firm to the inspection of worksite provisions of the Act.

DATED July 11, 1978.

_____
JERRY L. CONN

SUBSCRIBED AND SWORN to before me this 11th day of July, 1978.

_____
Notary Public in and for the State of Idaho, residing at Boise

My Commission expires:
8-9-80

OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION COMPLAINT
U. S. DEPARTMENT OF LABOR

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be registered with the U. S. Department of Labor.

Form Approved O.M.B. No. 0441R1449

Section 8(f)(1) of the Williams-Steiger Occupational Safety and Health Act, 29 U.S.C. 651, provides as follows: Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary of his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of the inspection, except that, upon request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are

reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees in writing of such determination.

NOTE: Section 11(c) of the Act provides explicit protection for employees exercising their rights, including making safety and health complaints.

For Official Use Only

Area	Date Received	Time
0160	5-17-78	9:30 A.M.

Region	Receivied By	Formal
10	Boise Office	Non "

The undersigned (check one)

X Employee ___Representative of Employees

__ Other (specify)_____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

_____

Employer's Name

J. R. Simplot
Employer's Address (Street)

Feedot No. 3
(City)

Highway 19 about 2 Mi. West of Caldwell
(State) (Zip Code) Telephone

Idaho
1. Kind of business
Feedlot - Grain mill

2. Specify the particular building or worksite where the alleged violation is located, including address.

Grain mill and fuel service truck

3. Specify the name and phone number of employer's agent(s) in charge.

Martin Schaffer

4. Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.

1. Fuel Service Truck

(a) pony motor for compressor about to throw a rod, may ignite fuel in truck.

(b) leaks around the diesel fuel and gasoline tanks on the truck (160 gal. ea).

(c) leaking fuel tank on the pony motor by the exhaust.

2. Wheat Mill

(a) unapproved electrical fixtures in mill with accumulation of combustible dusts.

5. (a) To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Governmental agency? Yes___ No _X_

5. (b) If yes, and you know, which Government agency?

6. Has this condition been brought to the attention of the employer?
Yes _X_ No___ Don't Know ___

7. Please indicate your desire:"
_X_ I do not want my name revealed to the employer.
___ My name may be revealed to the employer.

NOTE: It is unlawful to make any false statement, representation or certification in any document filed pursuant to the Occupational Safety and Health Act of 1970. Violations can be punished by a fine of not more than $10,000, or by imprisonment of not more than six months, or by both. (Section 17(g)).

Received by

Signature phone

Date 5-17-78

Opposition

Office - Supreme Court, U.S.
FILED
JAN 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-863

In the Supreme Court of the United States

OCTOBER TERM, 1981

J.R. SIMPLOT COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

FRANK A. WHITE
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

CHARLES I. HADDEN
ANN D. NACHBAR
Attorneys
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether, under the facts of this case, the warrant authorizing the inspection of petitioner's business premises pursuant to the Occupational Safety and Health Act of 1970 was overbroad.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-12) is reported at 640 F. 2d 1134. The opinions of the administrative law judge of the Occupational Safety and Health Review Commission (Pet. App. 18-21, 24-32) are not reported. The oral opinions of the district court (Pet. App. 15-17, 22-23) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1981. A petition for rehearing was denied on June 22, 1981 (Pet. App. 1-2). The petition for a writ of certiorari was filed on September 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner J.R. Simplot Co. operates a commercial facility on Highway 19, approximately two miles west of Caldwell, Idaho (Pet. App. 4, 40). This workplace is composed of at least three parts, two of which are relevant here: the Food Division, largely engaged in potato processing, and Simplot Feed Lots, Inc., a subsidiary of J.R. Simplot Co., engaged in cattle feeding (*id.* at 4). The two operations, though located on opposite sides of Highway 19, are jointly owned, and waste products of the Food Division's potato processing operation are used as animal feed in the Feedlot section of the workplace.

On May 17, 1978, a compliance officer of the Occupational Safety and Health Administration (OSHA) received a telephone call from a Simplot employee alleging two serious safety hazards at the Feedlot (Pet. App. 43-47).[1] On the following day, the officer attempted to inspect the workplace. He presented a copy of the complaint to a Simplot supervisor, who refused entry because the officer lacked a warrant (*id.* at 41).

Thereafter, on August 31, 1978, the compliance officer applied to the United States District Court for the District of Idaho for a warrant to inspect Simplot's premises (Pet. App. 36-39). This application for an inspection warrant was based on the information supplied by the Simplot employee and was made pursuant to Sections 8(a) and 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C.

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[1]The employee complaint alleged that there were leaking fuel tanks on a fuel service truck and that a defect in a nearby compressor might ignite the fuel in the truck (Pet. App. 45-46). In addition, the complaint alleged that there were unapproved electrical fixtures and an accumulation of combustible dusts in the wheat mill (*id.* at 46).

657(a) and 657(f)(1),[2] and to the pertinent regulation and program directive issued by the Secretary of Labor.[3] The

---

[2]Section 8(a), 29 U.S.C. 657(a), authorizes the Secretary of Labor "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area * * * where work is performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein * * *."

Section 8(f)(1), 29 U.S.C. 657(f)(1), provides that where an employee or employee representative believes "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists," he may "request an inspection" by presenting a signed, written notice to the Secretary "set[ting] forth with reasonable particularity the grounds for the notice * * *." If the Secretary then "determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative * * * in writing of such determination."

[3]The Secretary's regulation, 29 C.F.R. 1903.11(b), states that occupational safety and health inspections in response to formal employee complaints "shall not be limited to matters referred to in the complaint."

Program Directive No. 200-69, [1977-1978 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 11,137, later renumbered as OSHA Instruction CPL 2.12, provided that regardless of the source of a complaint, the investigation of complaints alleging serious hazards "should cover not only violations and dangers alleged in the complaint, but the entire establishment of the employer." Complaints that met the formality requirements of Section 8(f)(1) and that concerned working conditions that did not pose serious hazards were to be investigated with the same scope as serious hazard complaints. Non-formal complaints of non-serious hazards were to be inspected, but the inspections were to be limited to the specific areas addressed in the complaint. This instruction was superseded by OSHA Instruction CPL 2.12A, 1 Empl. Safety & Health Guide (CCH) para. 4014, which provides that complaint inspections in high-hazard industries should generally extend to the entire facility, but should be limited to the scope of the complaint in low-hazard industries. This guideline, in pertinent part, is currently in effect.

supporting affidavit (Pet. App. 40-42) recited that "the nature of the business conducted by the J.R. Simplot Company, consists of mining, growing, raising, processing and distributing of agricultural products such as potatoes, grain, cattle, and fertilizers * * *" (*id.* at 42). The application requested authority to conduct a full-scope inspection of Simplot's workplace on Highway 19 in order to determine whether the employer was complying with the Act (*id.* at 38).

On September 5, 1978, the district court issued the requested warrant (Pet. App. 33-35), which authorized OSHA inspectors to enter Simplot's workplace on Highway 19

> during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent, the aforesaid worksite and * * * all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein * * * bearing on whether this employer is furnishing to its employees employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards * * *.

Id. at 34.

The next day, September 6, 1978, authorized representatives of the Secretary returned to the Simplot establishment. Upon presenting the warrant, they were granted entry and were permitted to inspect the Feedlot, grain mill and food processing plant (Pet. App. 5).

2. As a result of the inspection, the Secretary cited petitioner for a number of violations of the Occupational Safety and Health Act. The company contested the citations, and

the case was assigned to an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission.

On January 23, 1979, petitioner filed a motion in the administrative proceeding to suppress evidence gathered during the inspection. The ALJ denied petitioner's motion (Pet. App. 24-32). The judge noted that several courts had suggested that the exclusionary rule does not apply in OSHA administrative proceedings (*id.* at 30-31). Turning to the merits of petitioner's substantive Fourth Amendment claims, the judge found that the employee complaint provided probable cause for the issuance of the inspection warrant (*id.* at 29), and he rejected the company's claim that the warrant, by its terms, authorized an inspection of only the Feedlot and grainmill and not of the Food Division (*id.* at 29-30). Finally, the judge ruled that petitioner's failure to object to the inspectors' entry into the Food Division constituted a waiver of any claim that the inspection had exceeded the actual scope of the warrant (*id.* at 31).

On August 16, 1979, the ALJ issued his decision regarding the substantive violations, affirming some of the citations and reiterating his denial of petitioner's motion to suppress (Pet. App. 18-21). The Occupational Safety and Health Review Commission denied Simplot's petition for discretionary review of the ALJ's decision (*id.* at 13-14).[4]

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[4]In the meantime, on April 6, 1979, petitioner had filed an application for a temporary restraining order in the United States District Court for the District of Idaho, seeking to suppress evidence in the administrative proceeding. On May 29, 1979, the district court denied relief (Pet. App. 22-23). Petitioner subsequently sought reconsideration and an evidentiary hearing on its claim. On August 31, 1979, a hearing was held before the same district judge who had issued the warrant. At the conclusion of the hearing, the district court denied relief (*id.* at 15-17), concluding that, because there was no "deliberate attempt [by the Secretary] to misuse and abuse the Court's process," the court lacked jurisdiction to "interfere" in the ongoing administrative enforcement action (*id.* at. 16-17).

3. The court of appeals affirmed the Commission's order (Pet. App. 3-12).[5] The court noted petitioner's concession that the employee complaint established probable cause to conduct a complete inspection of the entire Feedlot facility, not only of those specific areas of the Feedlot that were the objects of the complaint (*id.* at 8). Given this concession, the court concluded that the only issue requiring resolution was whether, based on the information presented in the warrant application, the issuing judge properly authorized inspection of the entire Simplot plant, which included the Food Division as well as the Feedlot operation (*id.* at 9-10). The court observed that the employee complaint, which was attached to the warrant application, specified the " 'Grain mill and fuel service truck' " as the areas containing the alleged violations (*id.* at 11), but that the warrant application itself "contained no facial reference to two distinct Simplot-owned facilities" (*ibid.*). The court concluded that the issuing judge "inferred reasonably, although perhaps erroneously, that the Simplot plant * * * was a single facility," and on this basis "authorized an inspection of the entire Simplot plant" (*ibid.*). Because there was no suggestion that the issuing judge acted unreasonably or in bad faith, the court declined to invalidate the warrant (*ibid.*).[6]

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[5]The court also affirmed the district court's denial of petitioner's application for an order suppressing evidence in the administrative proceeding (Pet. App. 6-8). The court held that the statutory review procedure set forth in Section 11(a), 29 U.S.C. 660(a), provides employers with an adequate method of obtaining review of objections to warrants that have already been executed, and that "because this procedure contemplates exhaustion of the administrative remedies, Simplot improperly sought relief in the * * * district court" (Pet. App. 8).

[6]Furthermore, the court of appeals noted that while the affidavit in support of the inspection warrant "arguably omitted any mention of the existence of two distinct Simplot owned facilities, Simplot has not alleged that the omission, if any, was the product of either a deliberate falsehood or reckless disregard for the truth" (Pet. App. 12). Accordingly, the court concluded that there was no basis for invalidating the warrant as being based on a misleading affidavit.

ARGUMENT

Petitioner urges the Court to grant review in this case in order to determine whether an OSHA warrant based on an employee complaint must restrict the inspection to those areas of the worksite mentioned in the employee complaint. This question raises two separate but related issues: (1) whether the Occupational Safety and Health Act authorizes the inspection of worksite areas outside the scope of an employee complaint, and (2) if so, whether such inspections are reasonable under the Fourth Amendment. Although the question of the statutory and constitutional validity of such inspections is an important one that might warrant review in an appropriate case, this is not such a case.

1. To begin with, the scope of the inspection that was conducted in this case was determined by an administrative program directive that is no longer in effect. See note 3, *supra*. That directive, OSHA Instruction CPL 2.12, required OSHA inspectors to conduct full-scope inspections in response both to complaints of serious hazards and to certain complaints alleging non-serious hazards. Under the revised guidelines set forth in CPL 2.12A, which were issued after the inspection involved in this case, full-scope inspections are reserved for complaints in high-hazard industries. Because the Secretary's new directive eliminates a great many full-scope complaint inspections, including the type conducted here, the Court should refrain from deciding the scope issue in the context of this atypical case. Cf. *Cook* v. *Hudson*, 429 U.S. 165 (1976); *Rice* v. *Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70 (1955).

2. In addition, review of the scope of inspection question is not warranted in this case in light of petitioner's concession, noted by the court of appeals (Pet. App. 8), that even though the employee complaint concerned conditions in only two specified locations in petitioner's Feedlot establishment, the Secretary was entitled, in response to that

complaint, to inspect the entire Feedlot facility. Thus, petitioner has acknowledged that an inspection based on an employee complaint may extend beyond the specific areas complained of and may cover the entire worksite.

To be sure, the inspection in this case covered both the entire Feedlot facility and the Food Division, located on the opposite side of the road from the Feedlot. But whether the district court and court of appeals correctly treated the Feedlot and Food Division units as comprising a single integrated entity is a fact-specific question, arising from the unusual—and perhaps unique—circumstances of this case, and does not warrant this Court's review. The court of appeals observed in this regard (Pet. App. 11) that "[t]he warrant application contained no facial reference to two distinct Simplot-owned facilities" and that therefore the district court had "inferred reasonably, although perhaps erroneously, that the Simplot plant * * * was a single facility." Moreover, while the employee complaint alleged the existence of violations in only one component of petitioner's establishment, the allegations concerning specific safety violations provided a reasonable basis to look for other violations that might have been present at petitioner's place of business. See page 11, *infra*. In these circumstances, the issuance of a warrant authorizing a full-scope inspection of the entire Simplot establishment was proper.

3. Furthermore, review is not warranted here because at the present time there is no square conflict among the courts of appeals on the scope of inspection question. Without reaching the constitutional issue, the Third Circuit, in *Marshall* v. *North American Car Co.*, 626 F. 2d 320, 324 (1980), held, as a matter of statutory construction, that "where an OSHA inspection is conducted under § 8(f) pursuant to an employee complaint, the scope of the inspection must bear an appropriate relationship to the violations

alleged in the complaint." Because the scope of the inspection in that case exceeded the area of the complaint and the Secretary did not argue that the inspection bore any relationship to the violations alleged in the complaint, the court held that the inspection violated the statute. On the other hand, the Seventh Circuit, in *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F. 2d 1313 (1980), upheld a full-scope inspection warrant based on an employee complaint; however, because each of the three judges on the panel wrote a separate opinion, there was no opinion for the court on the question presented in this case. Judge Sprecher alone discussed the statutory issue, stating a view contrary to that subsequently adopted by the Third Circuit; the other judges on the panel did not express any views with regard to the statutory question.[7] Thus, the Seventh Circuit cannot be said to conflict with the Third Circuit on the scope of inspection question.

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[7]Judge Sprecher stated that full-scope warrants are consistent with the Fourth Amendment as well as with the broad remedial purposes of the Act (625 F. 2d at 1322-1326), and he therefore voted to uphold the particular warrant involved in that case. *Id.* at 1326. Chief Judge Fairchild, concurring, found that the employee complaints were sufficiently diffuse to sustain a full-scope inspection regardless of the resolution of the constitutional question. *Id.* at 1326. Judge Wood dissented on the ground that in his view the Fourth Amendment requires the scope of OSHA warrants to be tailored to the specific complaints establishing probable cause. *Id.* at 1326-1327.

Petitioner erroneously contends (Pet. 11) that Chief Judge Fairchild agreed with dissenting Judge Wood that the Fourth Amendment requires warrants to be limited where possible to the scope of the underlying complaints establishing probable cause, and that the Seventh Circuit therefore agrees with the Third Circuit that OSHA warrants must be so restricted. In fact, Chief Judge Fairchild stated only that he found "much that [was] persuasive in Judge Wood's dissent." 625 F. 2d at 1326.

The court of appeals' decision in the instant case does not conflict with the holding of any other circuit.[8] The court below remarked that it "need not address" the constitutional or statutory issues discussed by other courts (Pet. App. 9). Instead, the court of appeals noted petitioner's concession that the employee complaint justified a full-scope inspection of petitioner's feedlot, and concluded that the reference in the warrant application to petitioner's entire business was not misleading and that the district court reasonably and in good faith issued the warrant based on that application.

In short, given the evolving state of the law in the lower courts, we submit that review by this Court should await further development of the scope of inspection issue in the courts of appeals.[9]

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[8]Two other courts have considered the scope of inspection issue. In an unpublished opinion, the Fourth Circuit affirmed a district court decision holding that full-scope warrants issued pursuant to employee complaints are constitutionally permissible. *Marshall* v. *Seaward International, Inc.*, 644 F. 2d 880 (1981), aff'g 510 F. Supp. 314 (W.D. Va. 1980). The Eighth Circuit, in dictum, has commented that the Fourth Amendment requires limited scope inspections. *Marshall* v. *Central Mine Equipment Co.*, 608 F. 2d 719 (1979). However, neither dictum nor unpublished opinions can contribute to the sort of "real and embarrassing conflict of opinion and authority between the circuit courts" justifying review by this Court. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

[9]The scope of inspection question is pending before the Ninth Circuit in three cases. See *In re Establishment Inspection of Hern Iron Works, Inc.* v. *Donovan*, No. 80-3440 (argued Dec. 8, 1981); *Donovan* v. *Burlington Northern, Inc.*, No. 81-3287; *Lewis-Youngstrom* v. *United States Department of Labor*, No. 81-3310. The issue is also pending before the Eleventh Circuit in *Donovan* v. *Sarasota Concrete Co.*, No. 81-5621.

4. Finally, although review is not warranted in this case, we submit that, to the extent the Secretary's regulations authorize full-scope inspections on the basis of an employee complaint, such inspections are consistent with the Act and the Fourth Amendment. Because inspections pursuant to employee complaints, like inspections based on general administrative standards, must be authorized by a neutral magistrate, there is no danger that the decision whether to conduct a full-scope search will be left to the unbridled discretion of the officers in the field. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). Moreover, if full-scope inspections are proper when conducted pursuant to general administrative plans—where there is no specific basis for suspecting that the conditions at a particular facility are in violation of the Act—then it is reasonable to conclude that full-scope inspections should also be permissible where there is probable cause to believe that a violation exists at a particular establishment. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra*, 625 F. 2d at 1323-1326 (opinion of Sprecher, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

FRANK A. WHITE
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

CHARLES I. HADDEN
ANN D. NACHBAR
Attorneys
Department of Labor

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